SUPREME COURT OF MISSOURI
en banc

CAUSE NO. SC92116

TERRY HORNBECK,

Appellant,

Vs.

SPECTRA PAINTING, INC.,

and

TREASURER OF THE STATE OF MISSOURI,
AS CUSTODIAN OF THE SECOND INJURY FUND,

Respondents.

On Appeal from the Labor and Industrial Relations Commission of Missouri
Injury No.: 06-124920

RESPONDENT'S SUBSTITUTE BRIEF

Respectfully Submitted:

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ARGUMENT

I. THE COMMISSION CORRECTLY ENTERED A FINAL PPD AWARD AS THERE IS SUBSTANTIAL AND COMPETENT EVIDENCE TO SUPPORT THE RULING

This Court has jurisdiction to hear an appeal from the Industrial Commission (hereinafter referred to as the "Commission") by virtue of Article V, Section 18 of the Missouri Constitution and Section 287.495.1 RSMo. (2000). However, this Court has limited authority to hear these cases and can reverse, remand or modify an award only if it determines:

> "1. That the Commission acted without or in excess of its powers,
>
> 2. That the award was procured by fraud,
>
> 3. That the facts found by the Commission do not support the award, or
>
> 4. That there was not sufficient or competent evidence in the record to warrant the making of the award."

Hager v. Syberg's Westport, 304 S.W.3d 771, 772-773 (Mo. App. ED 2010). In addition, the Missouri Constitution mandates that a determination be made as to whether the Award is supported by competent and substantial evidence by reviewing the whole record. Hampton v Big Boy Steel Erection, 121 S.W.3d 220, 222-23 (Mo. Banc 2003).

This Court is not bound by the Commission's conclusions of law or its application of the law to the facts of the case. Difatta-Wheaton v Dolphin Capital Corp., 271 S.W.3d 594, 595 (Mo. banc 2008). However, the Commission's findings of fact, its determination of credibility of the witnesses and the weight given by the Commission to conflicting evidence are given deference. Hager v. Syberg's Westport, 304 S.W.3d 771, 773 (Mo. App. E.D. 2010).

The Appellant argues in his brief that the Commission exceeded its powers, but a close review of the brief shows that the Appellant argues that the Commission exceeded its authority because it did not find a factual issue in his favor. Each of Appellant's arguments and theories of recovery are premised upon one fact: the opinions of Dr. Volarich. Appellant is seeking a determination by this Court that the Respondent should pay for medical treatment that he received after he was determined to be at Maximum Medical Improvement. Although Appellant points this Court to various medical records, only Dr. Volarich offered an opinion that this treatment was causally related to the accident at issue. Only Dr. Volarich offered the opinion that the Appellant was not at Maximum Medical Improvement.

Appellant seeks an award for Temporary Total Disability benefits after he was found to be at Maximum Medical Improvement. Again, this claim is based upon the opinion of Dr. Volarich that the Appellant was not at Maximum Medical Improvement.

Appellant seeks an order that he should receive additional medical treatment in the future. Again, this request is based upon the opinions of Dr. Volarich that the Appellant was not at Maximum Medical Improvement at the time he saw the Appellant.

Even the request for attorney fees and costs is premised upon Dr. Volarich's testimony. The request for attorney fees and costs presupposes that the Appellant is still in need of medical treatment for his accident related injuries and that the Respondent wrongfully withheld medical treatment and Temporary Total Disability benefits. The only opinion offered by Appellant to the Commission that the Appellant was not at Maximum Medical Improvement came from Dr. Volarich.

The Commission specifically noted the absence of any medical opinions offered by the Appellant. "Surprisingly, given the nature of the dispute over medical causation in this case, employee did not offer testimony from any of the doctors who provided his self-directed treatment after employer's doctors released him." Appendix to Appellant's Brief at Page A5. In essence, Appellant argues in his brief that the Commission erred in finding that his expert witness was not credible and in finding that the opinions of the treating doctors were more credible.

A review of the record as a whole shows that this case involves a medical dispute between the Appellant's hired opinion witness, Dr. Volarich, and three treating doctors. The treating doctors offered the opinion that the Appellant had

reached Maximum Medical Improvement. Dr. Volarich offered the opinion that the Appellant had not reached Maximum Medical Improvement. The Commission was called upon to make a factual determination as to the credibility of these witnesses. It made the factual determination that the three treating doctors were more credible witnesses that Dr. Volarich and ruled accordingly. This factual determination is to be given deference by this Court. The Commission did not exceed its authority in making a final ruling after it made the factual determination that the treating doctors were more credible.

Appellant cites this Court to Houston v Roadway Express, Inc., 133 S.W.3d 173 (Mo. App. S.D. 2004) and asserts that because none of the treating doctors specifically challenged Dr. Volarich's opinions, that Dr. Volarich's opinions were undisputed and should have been accepted by the Commission. However, Houston is distinguishable from this case. In Houston, the Commission stated it was using the opinions and findings of Dr. Vale in issuing its final award. But the Commission's decision was actually contrary to the final opinions of Dr. Vale. The Commission never discussed Dr. Vale's credibility in its final award nor did it explain why its decision was contrary to Dr. Vale's opinions. Thus, its final award was not supported by substantial credible evidence as it ran contrary to the only credible medical evidence. Houston, supra, at 180

In the instant case, the Commission specifically addressed the testimony and opinions of Dr. Volarich at length in its opinion. The discussion is too lengthy to be quoted verbatim in this Brief, but the discussion is contained on pages A4 and A5 of the Appendix to Appellant's Brief. The Commission's conclusion at the end of this discussion is significant when reflecting upon the Appellant's failure to meet his burden of proof: "Essentially, employee asks this Commission to find that he remains in need of treatment as a result of the work injury, despite extensive treatment by six different specialists none of whom identified the November 2006 accident as the prevailing factor causing a medical condition and disability that warranted treatment after April 2007." Appendix to Appellant's brief, Page A5.

In addition, there was competent medical testimony presented to the Commission which disagreed with the opinions of Dr. Volarich. Drs. Paletta, Aubuchon and Chabot all provided testimony. Thus, there was a dispute between medical doctors as to whether the Appellant had attained MMI in April 2007 when the three doctors released him. Unlike Houston, the instant case contains conflicting opinions and the Commission was called upon to determine which doctor it felt was more credible. Where there are conflicting medical opinions before the Commission, it is the task of the Commission to determine which opinion is more credible. Gordon v. City of Ellisville, 268 S.W.3d 454, 460 (Mo. App. E.D. 2008)

It should be noted that the Commission did not mandate that the Appellant depose any particular doctor. No such mandate is found in the Commission's ruling. The observation by the Commission that the Appellant's was treated by six specialists and none offered the opinion that on going medical treatment was related to the incident was an observation that the Appellant's entire case rested upon the opinions of Dr. Volarich.

The Commission determined that the Appellant had attained MMI as of April 2007. This finding is supported by the *testimony* of the three treating doctors: Paletta, Aubuchon and Chabot. Dr. Paletta treated the Appellant from November 15, 2006 [Tr 1613:1-22] to March 28, 2007 [Tr 1645: 21-23]. In his medical opinion, the Appellant had attained Maximum Medical Improvement of the left shoulder and released him from care.

Dr. Aubuchon started treating the Plaintiff in February of 2007. He completed his treatment in April of 2007 and released the Appellant. In his medical opinion, the Appellant had attained Maximum Medical Improvement of his heel and released the Appellant from his care. [Tr. 1744: 1-19]. Dr. Chabot also started treating the Appellant in February of 2007 [Tr. 1577:15 – 1578:23]. He ordered physical therapy for the Appellant which was provided. Dr. Chabot then came to the medical opinion that the Appellant had attained MMI and released him from care on April 2, 2007. [Tr. 1560: 17-21].

The Commission had the opportunity to review the depositions of all three doctors including the cross-examination from Appellant's attorney. The Commission also had the opportunity to review the deposition of Dr. Volarich and the cross-examination from the Respondent's attorney. It was well within the Commission's discretion to determine that Dr. Volarich's opinions were not credible and to decide that the opinions of Drs. Paletta, Aubuchon and Chabot were more credible.

Appellant cites Daly v. Powell Distributing, Inc., 328 S.W.3d 254 (Mo. App. WD 2010) for the proposition that the Commission cannot reject uncontroverted medical testimony. However, a close review of the Daly opinion shows that its facts are distinguishable from this case. In Daly, the issue was whether the Appellant's neck injury was compensable. The Commission was presented with the testimony of Dr. Cohen who said the injury was compensable. The Employer countered with the testimony of Dr. Heim. Although the Commission found that the injury was not compensable in conformance with the opinions of Dr. Heim, the Commission also stated that it felt Dr. Heim was not qualified to render an opinion about the Appellant. In essence, the Commission discounted the credibility of a witness and then relied upon the very witness it had discredited to base its decision. "Because no expert testimony conflicted with Dr. Cohen's testimony supporting a finding of a direct and causal connection between the injuries and work, the

Commission's decision was not supported by the record." Daly, supra, at 261. In the instant case, the Commission decided that the three treating doctors were more credible than Dr. Volarich and its decision naturally flowed from that factual decision.

Appellant also cites Angus v Second Injury Fund, 328 S.W.3d 294 (Mo. App. W.D. 2010). Once again, however, a review of the facts of that case shows that it is distinguishable from the instant matter. The Court of Appeals noted in Angus that there was only one doctor who offered any testimony. "The sole medical testimony at the hearing came from Dr. Preston Brent Koprivica." Angus, supra, at 300. This physician offered the opinion that the Appellant was permanently totally disabled. The Commission found that the injury in question was not a combination of factors, but was related solely to a pre-existing condition. The Court of Appeals stated: "Moreover, the Commission's conclusion in this regard is also troubling because *all* the medical evidence before it contradicted the Commission's ultimate medical conclusion." (emphasis in original) Angus, supra, at 302.

In the instant case, the medical factual issue before the Commission was whether the Appellant was at MMI by April of 2007. The record before the Commission contained substantial and competent evidence to support that opinion. As mentioned before, three doctors offered opinions concerning this issue: Drs.

Paletta, Aubuchon and Chabot. There was no evidence presented by Appellant before the Commission showing that these doctors lacked the expertise or competence to treat the Appellant or render opinions concerning his care, treatment, prognosis and condition. Thus, their opinions are substantial competent evidence to support the Commission's decision.

The Appellant's reliance on Tillotson v St. Joseph Medical Center, 347 S.W. 3d 511 (Mo. App. WD 2011) is misplaced. In that case, the employer's doctors and the employee's doctors agreed that given the employee's advanced arthritis, the only medically accepted method to treat the employee's torn meniscus was by knee replacement surgery. The employer argued it should not pay for the knee replacement surgery because the arthritis was not caused by the work related injury. The Court of Appeals held that since the knee replacement surgery flowed from the work related accident, the Commission's reliance upon the prevailing factor test was erroneous.

In essence, in Tillotson there was an agreement between the parties that the employee required knee replacement surgery to cure the work related injury. No such agreement exists in the instant case. The Respondent's treating doctors testified that the employee did not require any additional medical treatment and was at maximum medical improvement. The Appellant's rating doctor testified that the employee was not at maximum medical improvement. This conflict in medical

testimony was resolved by the Commission. Where evidence before the Commission supports "either of two opposed findings, the reviewing Court is bound by the administrative determination, and it is irrelevant that there is supportive evidence for the contrary finding." Pulitzer Pub. Co. v. Labor & Industrial Relations Commission, 596 S.W.2d 413, 417 (Mo. banc 1980)

The Commission made a factual determination as to the credibility of witnesses. All of its rulings stem from this determination. This factual determination is supported by competent factual evidence and is to be given deference by this Court. Thus, the decision by the Commission should be affirmed.

II. THE COMMISSION'S RULING CONCERNING THE AMOUNT OF THE PENALTY IS VAGUE

a. THE COMMISSION'S RULING IS VAGUE IN THAT IT DOES NOT ADDRESS A STIPULATED CREDIT.

The Commission found that the Respondent violated a safety statute and ordered that the compensation as awarded by the Administrative Law Judge be increased by 15%. The Commission did not make a specific ruling as to the amount of any such penalty. In his Findings of Fact, the Administrative Law Judge noted that the parties stipulated that "the Employer has a $7,000.00 indemnity credit against any further liability herein." (Appendix to Appellant's Brief at page A16) Thus, the amount awarded by the Administrative Law Judge for permanent partial disability is $20,636.89.

b. THE COMMISSION'S RULING IS VAGUE IN THAT IT DOES NOT STATE WHETHER THE 15% PENALTY IS TO BE ASSESSED AGAINST THE AWARD AGAINST THE SECOND INJURY FUND.

The second issue is whether the penalty should also apply to sums ordered to be paid by the Second Injury Fund. Counsel will concede that he has been unable to find any case law to give this Court guidance on this question. Counsel for Appellant has not addressed this question in his brief. As the compensation due

from the Second Injury Fund is based upon a combination of past injuries and the injury at issue, it is respectfully submitted that any penalty should not include monies due from the Second Injury Fund.

The Second Injury Fund was created to provide compensation to an employee when an injury related injury combines with pre-existing disabilities to cause a greater disability than the work related injury itself. Garibay v Treasurer of State of Missouri, 964 S.W.2d 474, 479 (Mo. App. ED 1998). Importantly for the purpose of this case, the Fund was created to relieve the employer from liability for disability which is not specifically attributed to an injury suffered during the employment period with that particular employer. Garibay, supra. See also, Meilves v Morris, 422 S.W.2d 335, 338 (Mo. 1968)

Additional guidance can be obtained from §287.220 RSMo. which created the Second Injury Fund. This statute provides that if an employee has a pre-existing disability and suffers a new work related injury "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability." §287.220 RSMo.

"The purpose of a penalty is to encourage employers to comply with the laws governing safety." Pavia v. Smitty's Supermarket, 118 S.W.3d 228, 244 (Mo. Ct. App. 2003) If an employer violates a safety statute and that violation causes an

injury, then the employer is punished for causing that injury. However to also assess a penalty to the employer for monies ordered to be paid by the Fund would penalize an employer for pre-existing injuries over which it had no control and no liability. This would expose Respondent to liability which §287.220 RSMo protects.

In the instant case, the Appellant was found to have pre-existing injuries to his right shoulder and left shoulder. (Appendix to Appellant's brief at page A29) Accordingly, the Appellant was awarded an additional 42.4 weeks of PPD from the Second Injury Fund. There was no evidence before the Commission that this accident was the prevailing factor in the injuries to the shoulders. The Respondent should not be punished for injuries which did not result from its conduct.

CONCLUSION

Respondent respectfully requests that this Honorable Court affirm the Final Award issued by the Missouri Industrial Commission on all issues save the issue of the 15% penalty. On that issue, Respondent requests an Order clarifying the Penalty Award including the credit which the Appellant Stipulated to at the time of the hearing before the Administrative Law Judge and for an Order that the award against the Second Injury Fund shall not be included in the calculation of any such penalty, and for such other and different relief as the Court deems just a proper.

Respectfully submitted,

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RESPONDENT'S CERTIFICATIONS

1. The undersigned hereby certifies that on the 6th day of February, 2012, a copy of the foregoing Brief and a copy on CD were delivered, pursuant to Rule 84.06(g), by first class U.S. Mail, postage pre-paid, to: Charles Bobinette, Attorney for Appellant, 3636 S. Geyer Rd., Suite 250, St. Louis, MO 63127 and to Karin Krohn, Attorney for Second Injury Fund, P.O. Box 861, St. Louis, MO 63188.

2. This brief complies with the limitations contained in Rule 84.06 (b) and Local Rule 360 in that it is within the word limitations set forth therein.

3. There are 3,492 words in this brief, prepared in proportional space type.

4. This brief was prepared by Microsoft Word 2007 computer software and has been scanned for viruses and is virus free.

_/s/ Michael P. McDonald, Jr.
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